

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARK GREEN a/k/a MARK WALLACE : CIVIL ACTION
:
v. :
:
SUPT. MARTIN DRAGOVICH, et al. : No. 02-1924

MEMORANDUM ORDER

Petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Petitioner states that he pled guilty to two fraud charges on July 19, 2001 in the Philadelphia Common Pleas Court and was sentenced on December 19, 2001 to a term of imprisonment of one to two years which he is now serving. Petitioner states that he has an appeal pending in the Superior Court. The basis of that appeal is not evident.

Petitioner asserts that he "is being held illegally in violation of Pennsylvania Criminal Procedure Rule 521" and "Article I, § 14 of the Pennsylvania Constitution" as he was initially released on bail prior to trial and the state court did not enter a formal order revoking bail.

Article I, § 14 provides that with limited exceptions "prisoners shall be bailable." This general right to bail, however, applies only to criminal defendants awaiting trial and not to persons convicted of a crime. See Commonwealth v. McDermott, 547 A.2d 1236, 1242 (Pa. Super. 1988).

There is no Rule 521. Presumably, petitioner meant to cite to Pa. R. Crim. P. 4009(b) which addresses bail after sentencing pending appeal or post-sentence proceedings. This rule "conveys no 'right' to the defendant; rather it defines the scope of the trial court's 'discretion' to admit the convicted defendant to bail pending appeal." McDermott, 547 A.2d at 1242 n.5 (discussing identical language in prior rule). The rule provides that a defendant whose imposed sentence "includes imprisonment of less than two years" retains the same right to bail as before the verdict subject to modification by the court and contemplates that when a sentencing court exercises its discretion to refuse bail, the reasons for that decision will be stated on the record. See Pa. R. Crim. P. 4009(B)(1) & 4009 (C).

The sentence imposed on petitioner was not less than two years imprisonment. The minimum term of a prison sentence imposed under Pennsylvania law is merely the time before which a prisoner is ineligible for parole. A prison sentence with a minimum and maximum term is the functional equivalent of a sentence at the maximum term. See Bovkun v. Ashcroft, 283 F.3d 166, 170-71 (3d Cir. 2002) ("petitioner's sentence of 11 to 23 months" is "functionally the same as a sentence of 23 months").

In any event, the disregard of state law provisions for bail by a state court is not a federal constitutional violation and does not provide a basis for federal habeas relief. See

Johnson v. Rosemeyer, 117 F.3d 104, 110 (3d Cir. 1997); Montgomery v. Meloy, 90 F.3d 1200, 1206 (7th Cir. 1996); Marks v. Zelinski, 604 F. Supp. 1211, 1213 (D.N.J. 1985). The Eighth Amendment right to reasonable bail is applicable to the states, however, it is a right which applies only to persons who have not been convicted. See Sistrunk v. Lyons, 646 F.2d 64, 67-68 (3d Cir. 1981). There is no federal constitutional right to bail pending an appeal or to a statement of reasons for its denial. See Marks, 604 F. Supp. at 1213. To sustain a federal claim, a petitioner must demonstrate that denial of bail was arbitrary or without any rational basis. Id. This may be difficult to do where one has been sentenced following a conviction on a guilty plea, and petitioner has made no such showing.

Moreover, it is axiomatic that a state prisoner must exhaust state remedies before he may maintain a federal habeas claim. See 28 U.S.C. § 2254(b)(1). Petitioner can petition the Superior Court for bail or initiate a state habeas action if he is being confined unlawfully. He acknowledges he has not done so.

Petitioner has submitted neither the \$5 filing fee nor a motion for leave to proceed in forma pauperis. To require him to do so now would be pointless. The court would still be required to deny his petition without prejudice to present any

cognizable federal habeas claim he may be able to assert after exhaustion of state remedies.

ACCORDINGLY, this day of April, 2002, **IT IS**
HEREBY ORDERED that petitioner's petition for a writ of habeas
corpus pursuant to 28 U.S.C. § 2254 is **DENIED** without prejudice
and the above action is **DISMISSED**, without a certificate of
appealability.

BY THE COURT:

JAY C. WALDMAN, J.